

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Cochise Broadcasting LLC)	
)	
Application for Minor Modification of Station)	File No. BPH-20140709AAK
KTBX(FM), Tubac, Arizona)	Facility ID No. 171024

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 2017

Released: December 5, 2017

By the Commission:

1. In this Memorandum Opinion and Order, we deny the application for review filed by Cochise Broadcasting LLC (Cochise) on August 17, 2017 (Application for Review). Cochise seeks review of a July 18, 2017, letter decision by the Audio Division, Media Bureau (*Letter Decision*).¹ In the *Letter Decision*, the Bureau upheld on reconsideration the dismissal of the above-referenced application for minor modification (Modification Application) of station KTBX(FM), Tubac, Arizona (Station). The Bureau determined, after consultation with the International Bureau, that the Modification Application violated the terms of the *1992 Agreement Between the Government of the United States of America and the Government of the United Mexican States Relating to the FM Service in the Band 88-108 MHz*, August 11, 1992 (*USA-Mexico Agreement*).²

2. *Background.* In the Modification Application, Cochise proposed to change the Station's transmitter location, effective radiated power, and antenna height. After providing Cochise with an opportunity to file a curative amendment, Bureau staff dismissed the Modification Application because the proposal would cause overlap between the Station's proposed interfering signal contour and the 65-kilometer protected contour of the Channel 263B allotment at Magdalena, Sonora, Mexico, in violation of Article 7, Section 7.3, of the *USA-Mexico Agreement*.³ On reconsideration, the Bureau upheld this action, stating that the Modification Application, if granted, would create areas of interference within the borders of Mexico and declined to request concurrence from Mexico for such interference. The Bureau also explained that the Modification Application was not "similarly situated" to the applications Cochise cited because the cited applications all involved interference occurring within the United States and not within Mexico.⁴ In the Application for Review, Cochise acknowledges that the proposed KTBX contour would overlap the protected contour of Channel 236B at Magdalena, Sonora, Mexico within the borders of Mexico, but argues that the application should have been referred to Mexico for concurrence rather than dismissed by the Audio Division.⁵ Cochise reiterates its argument raised before the Bureau that the

¹ *Susan A. Marshall, Esq.*, Letter Order, Ref. No. 1800B3-CEG (MB July 18, 2017) (*Letter Decision*).

² *USA-Mexico Agreement*, Article 7, Section 7.3, available at <http://transition.fcc.gov/ib/sand/agree/files/mex-bc/fmbe.pdf> (last visited Oct. 17, 2017) (establishing that modification applications "shall be subject to coordination between Administrations and shall only be accepted when its interfering contour does not overlap the protected contours of existing allotments and assignments of the other country, whose protected contours are to be calculated based upon their maximum permitted parameters . . .").

³ *Ted Tucker*, Letter, Ref. No. 1800B3-AED (Dec. 21, 2015).

⁴ *Letter Decision* at 2.

⁵ Application for Review at 2-3.

Bureau treated the Modification Application differently than other, similarly-situated applicants, in violation of the D.C. Circuit's holding in *Melody Music*.⁶ Cochise contends that the Bureau failed to provide an adequate rationale for "departing from the treatment which it has accorded previous applicants over a number of years" and failed to explain the underlying rationale for making a factual distinction between overlap caused within the United States and overlap caused within the borders of Mexico.⁷

3. *Discussion.* Upon review of the Application for Review and the entire record, we conclude that Cochise has not demonstrated that the Bureau erred. The *USA-Mexico Agreement* states that a proposed modification to the Plan of Allotments and Assignments which does not conform to the specified Tables in the agreement "shall be subject to coordination between Administrations and shall only be accepted when its interfering contour does not overlap the protected contours of existing allotments and assignments of the other country."⁸ The *USA-Mexico Agreement* does not contemplate that either administration will commence the Notification Procedures⁹ for purposes of considering a proposal that fails to meet the terms of acceptance specified in the *Agreement*, i.e., a proposed modification "shall only be accepted when its interfering contour does not overlap the protected contours of existing allotments and assignments of the other country." By Cochise's own admission, the Modification Application includes an overlap to the protected contours of existing allotments and assignments of Mexico within the borders of Mexico.¹⁰ Because the proposal would violate the respective allotment plans as set forth in the *USA-Mexico Agreement*, the Bureau properly decided the matters raised, and we uphold its decision to dismiss Cochise's application for minor modification.

4. We reject Cochise's argument that dismissal of its application for minor modification is inconsistent with prior Commission policies and violates the D.C. Circuit's decision in *Melody Music*.¹¹ Here, the instances of allegedly inconsistent treatment of other applicants were all decided by the Media Bureau's Audio Division and were not challenged before the Commission.¹² Thus, Cochise's *Melody Music* argument ignores D.C. Circuit precedent "that an agency is not bound by the actions of its staff if the agency has not endorsed those actions."¹³ The prior treatment of other applicants by the Audio Division is not before us for review in this proceeding, and we accordingly express no opinion on the ultimate conclusions reached in those staff determinations. We do note, however, that each of the other applicants about which Cochise complains involved an application that was not similarly situated to the proposal submitted by Cochise because such applications involved "'shoulder' interference"¹⁴ occurring *within the United States*.¹⁵ In contrast, the Audio Division has consistently declined to request Mexican

⁶ Application for Review at 2 (citing *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965) (holding that the Commission acted arbitrarily and capriciously when it treated two similarly-situated licensees differently without an adequate explanation for doing so)).

⁷ Application for Review at 2-5.

⁸ *USA-Mexico Agreement*, Article 7, Section 7.3.

⁹ *Id.*, Article 8.

¹⁰ Application for Review at 2.

¹¹ Application for Review at 3-5 (citing *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965) (holding that the Commission acted arbitrarily and capriciously when it treated two similarly-situated licensees differently without an adequate explanation for doing so)).

¹² See Application for Review, Engineering Statement (attachment).

¹³ *Comcast Corp. v. FCC*, 526 F.3d 763, 769-70 (D.C. Cir. 2008); see also *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021 (D.C. Cir. 2017),

¹⁴ A directional antenna can reduce its effective radiated power (ERP) in a given direction. The resulting area of reduced ERP, or "null," may appear as a recessed area or indentation in the station's interfering contour. The two areas of relatively greater ERP that protrude on either side of the null may be referred to as "shoulders."

¹⁵ *Letter Decision* at 2. See also Application for Review, Engineering Statement (attachment).

concurrence for applications that would cause any overlap within Mexican territory.¹⁶ In any event, as indicated above, all we decide here is that Cochise has not demonstrated that the Bureau erred in dismissing its application; we do not address those prior applications that are not before us.

5. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,¹⁷ and Section 1.115(g) of the Commission's Rules,¹⁸ the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁶ See, e.g., *Iglesia Familiar Nuevo Principio*, Letter, Ref. No. 1800B3-TB (MB Dec. 22, 2010) (dismissing File No. BNPED-20100226ACP for failure to comply with the *USA-Mexico Agreement* due in part to prohibited overlap within Mexico); *First Baptist Church of Hemet*, Letter, Ref. No. 1800B3-TB (MB Sept. 13, 2010) (dismissing File No. BNPED-20100225AAP for failure to comply with the *USA-Mexico Agreement* due in part to prohibited overlap within Mexico); *World Radio Network, Inc.*, Letter, Ref. No. 1800B3-TB (MB Oct. 29, 2007) (dismissing File No. BPED-20070905AAV for failure to comply with the *USA-Mexico Agreement* due in part to prohibited overlap within Mexico).

¹⁷ 47 U.S.C. § 155(c)(5).

¹⁸ 47 CFR § 1.115(g).